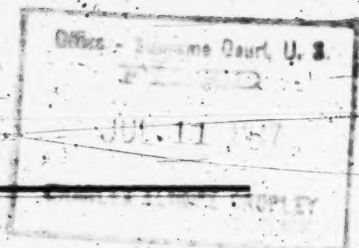


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,
Petitioner,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN,
DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF
INTERNATIONAL INDUSTRIES,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

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and if such testimony was admitted into evidence and a part of the record on appeal, whether the judgment of the District Court should be affirmed.

II. Whether, under Rule 50(b) of the Federal Rules of Civil Procedure and *Cone v. West Virginia Pulp & Paper Co.*, U. S., 67 S. Ct. 752 (1947), the Circuit Courts of Appeals have power, where both parties moved for directed verdicts and a verdict was directed for the plaintiff, to reverse and remand with instructions to grant defendants' motion for a directed verdict and to enter judgment thereon, in the absence of a motion by defendants for judgment in accordance with their motion for a directed verdict.

III. Whether, under Rule 50 of the Federal Rules of Civil Procedure, the Circuit Courts of Appeals have power to direct the District Court to grant a motion for a directed verdict and enter judgment thereon upon grounds not specified in the motion for a directed verdict.

IV. Whether the Circuit Court of Appeals denied trial by jury to the plaintiff in violation of the Seventh Amendment to the United States Constitution in directing the District Court to grant defendants' motion for a directed verdict and to enter judgment thereon, upon grounds not stated in the defendants' motion, and, hence, not reserved for later determination by Rule 50(b) of the Federal Rules of Civil Procedure.

V. Whether, assuming that questions I through IV are answered adversely to petitioner's contentions, it was arbitrary, capricious and an abuse of discretion under the circumstances of this case for the Circuit Court of Appeals to reverse with instructions to the District Court to grant defendants' motion for a directed verdict and to enter judgment thereon rather than to remand for a new trial.

REASONS FOR GRANTING CERTIORARI

I.

The Circuit Court of Appeals decided a question of importance under the Federal Rules of Civil Procedure in a manner in conflict with the decision of this Court in *Cone v. West Virginia Pulp & Paper Co.*

The Circuit Court of Appeals reversed the judgment of the District Court in favor of the plaintiff and directed the District Court to grant the defendants' motion for a directed verdict and to enter judgment thereon in favor of defendants. The defendants had made no post-verdict motion pursuant to Rule 50(b) for judgment in accordance with their motion for a directed verdict.

In *Cone v. West Virginia Pulp & Paper Co.*, _____ U.S. _____, 67 S. Ct. 752 (1947), for the reasons there stated this Court made clear that a party's failure to make such a post-verdict motion constituted an insuperable barrier to the entry by the Circuit Court of Appeals of a final judgment for the party losing below. This case is precisely like the *Cone* case except that here the jury returned its verdict at the direction of the District Court rather than as its own independent action. Although this may constitute a distinction in fact, it does not warrant a different result.

The Circuit Court of Appeals held this distinction to be controlling. It determined that Rule 50(b) had application "only to cases where the matter is submitted to a jury for its independent voluntary consideration and verdict" (R. 259-260). This conclusion is erroneous in that it is contrary both to the express language of Rule 50(b) and its purpose as announced by this Court in the *Cone* case.

Rule 50(b) is as follows:

"(h) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all

the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

In requiring the party whose motion for a directed verdict had been denied to move for judgment in accordance with his motion for a directed verdict before a Circuit Court of Appeals can dispose finally of the proceedings, Rule 50(b) draws no distinction between whether the jury returned the verdict as its independent act, whether it returned the verdict at the direction of the trial court, or, indeed, whether it failed to return any verdict at all. The Rule deals uniformly with motions for directed verdicts and their consequences under all possible circumstances. It divides the possibilities into two categories: either a verdict was received, or it was not returned and the jury was discharged. Here, as in the *Cone* case, the verdict was received (R. 203).

The District Court recognized that even where a verdict is directed, it is essential that the verdict be returned by the jury and received by the judge (R. 203-204). We take it that there is no question but that a directed verdict

is one returned and received within the meaning of Rule 50(b) as fully as though it had been the independent act of the jury. This accords with what has always been the view taken by this Court of a directed verdict. Thus, in *Hodges v. Easton*, 106 U. S. 408 (1882), the Court, speaking through Mr. Justice Harlan, said (at 412):

"Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as to have authorized the withdrawal of the case altogether from the jury, by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court."⁵

Even if for any reason the fact that the verdict was directed may suggest that it was not returned or received within the meaning of Rule 50(b), the post-verdict motion for judgment would still be required since this case must then be regarded as falling within the other category established by the Rule; that is, that the jury was discharged without returning the verdict. This seems to us, however, to be contrary not only to the record facts which disclose that a jury verdict was returned and received (R. 203-204), but contrary to the historical conception of directed verdicts. *Hodges v. Easton*, *supra*.

The Circuit Court of Appeals approached the question from the wrong end of the stick. What it regarded as controlling was the submission of the issues to the jury for their independent consideration, whereas what the Rule treats as controlling is the preservation to the trial judge of a subsequent and more leisurely opportunity both to

⁵ This suggests the existence of quite another defect in the judgment of the Circuit Court of Appeals. It is not clear to us how the Circuit Court of Appeals can instruct a District Court to direct a verdict where the jury has already been discharged. This paradox underscores the requirement of Rule 50(b) for a post-verdict motion for judgment in order to provide the foundation for the final disposition of the proceedings on appeal.

determine whether he had erred, and if he had, to determine in his initial discretion whether the entry of judgment or the granting of a new trial would provide the most appropriate vehicle for the correction of that error. So viewed, it is clear that in interpreting Rule 50(b) and in distinguishing the *Cone* case, the Circuit Court of Appeals was guided by immaterial criteria not to be found in the Rule. The effect of its action is to rewrite Rule 50(b) so as to carve out an exception for directed verdict cases where none exists.

In its decision in the *Cone* case, this Court set forth in detail the reasons for its conclusion that Rule 50(b) required a party to move for judgment in accordance with his motion for a directed verdict in order to confer power upon the Circuit Court of Appeals to direct the entry of judgment in his favor. This Court pointed out that Rule 50(b) is in the alternative and confers upon the trial court the discretion to reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. This Court emphasized the importance of the peculiarly informed discretion and judgment of the trial court in determining whether a new trial, rather than a final termination of the trial stage of the controversy, would better serve the ends of justice. It was pointed out that the trial judge had the "feeling of the case which no appellate printed transcript can impart." Moreover, this Court further emphasized the practical reasons underlying Rule 50(b) which compel the same result. The Court stressed the situation where, because of the failure of an essential element of proof which could be supplied, the plaintiff has the right under Rule 41(a)(2) to apply to the trial court for a dismissal without prejudice. These reasons are of controlling validity regardless of whether the jury's verdict was its independent act or the consequence of the court's direction.

In addition to their general validity, these reasons are particularly applicable here. As has heretofore been pointed out, and as will be stressed hereafter, the Circuit Court of Appeals directed the entry of final judgment for the defendants because of what is at most a technical defect in the complaint and in the face of existing uncontradicted testimony (whether or not admitted into evidence) which would cure that defect. Under such circumstances it is inconceivable that a trial court at the trial stage would have finally foreclosed the plaintiff from remedying the alleged deficiency if it had been pointed out to him by an appropriate motion.

Wholly apart from the conflict of the decision of the Circuit Court of Appeals with that of this Court in the *Cone* case, the question presented is an important federal question which should be settled by this Court, involving, as it does, not only the power of the Circuit Courts of Appeals under frequently recurring circumstances, but the daily motion practice of the trial bar.

II.

The instruction to the District Court to grant the defendants' motion for a directed verdict was based upon grounds not specified in defendants' motion. This presents an important federal question as to the proper interpretation of Rule 50 of the Federal Rules, which has not been, but should be, decided by this Court, and in addition, decides a constitutional question in a way probably in conflict with applicable decisions of this Court.

There is no doubt but that the Circuit Court of Appeals rested its judgment instructing the District Court to grant the defendants' motion for a directed verdict upon grounds not specified in that motion. The Circuit Court of Appeals relied solely and expressly upon the ground that the complaint had alleged, and the plaintiff had relied upon, an

express warranty as to which there was a total failure of proof (R. 231). On denial of the petition for rehearing, the Circuit Court of Appeals determined (contrary to the fact) that the proof relied upon by the plaintiff as establishing an implied warranty was not in the record (R. 258).

Neither of these grounds had been specified or intimated in the defendants' motion for a directed verdict, which the Circuit Court of Appeals directed the District Court to grant (R. 202). As a matter of fact, the third ground of the defendants' motion for a directed verdict assumed the existence of a warranty and argued merely that the evidence was insufficient to establish such a breach as would entitle the plaintiff to reject the entire shipment (R. 202).

Rule 50(a) requires that a motion for a directed verdict shall "state the specific grounds therefor".⁶ Rule 50(b) provides that if such motion is not granted, the action is submitted to the jury subject to the later determination of the "legal questions raised by the motion", and authorizes a motion to have "judgment entered in accordance with [the party's] motion for a directed verdict." The Rule, therefore, discloses a coherent scheme to require the grounds for the motion for a directed verdict to be fully displayed and to give both the trial court and the other party a full and repeated opportunity for mature consideration of such grounds. The Circuit Court of Appeals read the Rule as though the quoted language were omitted.

⁶ Rule 50(a) is as follows:

"(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

It determined that the District Court had erred in not doing what it was never asked to do.

The effect of the decision is to permit appeals based upon errors lurking in the record which might have been corrected either by the parties or the trial court had they been appropriately raised. This Court pointed out in the *Cone* case that the motion under Rule 50(b) for judgment in accordance with the motion for a directed verdict afforded the trial judge a last change to correct his errors. This becomes a futile last chance indeed if a party need not specify his grounds in his motion for a directed verdict. The considerations which were so compelling in connection with a motion for judgment in accordance with a motion for a directed verdict are equally or even more compelling in connection with the motion for a directed verdict itself.

As the notes of the Advisory Committee on Rules for Civil Procedure show, the requirement of Rule 50(a) that a motion for a directed verdict shall state the specific grounds therefor, was intentionally adopted for the purpose of resolving a conflict between the Circuit Courts of Appeals over the correct federal practice. In addition, under Rule 50, other Circuit Courts of Appeals have consistently assumed that the motion for a directed verdict must specify its grounds before such grounds will be noticed upon appeal. *Virginia-Carolina Tie & Wood Co. v. Dunbar*, 106 F. (2d) 383 (C.C.A. 4th, 1939); *Atlantic Greyhound Corporation v. McDonald*, 125 F. (2d) 849 (C.C.A. 4th, 1942); *Ryan Distributing Corp. v. Caley*, 147 F. (2d) 138 (C.C.A. 3rd, 1945) *cert. den.* 325 U.S. 859 (1945).

Moreover, in applying Rule 50 as it did, the Circuit Court of Appeals has revived substantial constitutional questions that were intended to be put at rest forever by the Federal Rules. In *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913), it was held to be a re-examination of the

facts contrary to the common law and hence to the Seventh Amendment for a Circuit Court of Appeals to direct a judgment where the legal questions raised by a motion for a directed verdict had not been reserved for later determination. In *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935) this Court approved the final disposition of the proceedings by a Circuit Court of Appeals where the legal questions raised by the motion to direct a verdict had been expressly reserved by the trial court. In *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389 (1937), where the motions of both parties for directed verdicts had been denied and the issues submitted to the jury unconditionally, this Court reaffirmed the *Slocum* case and held the Circuit Court of Appeals to be without power on reversal to direct judgment for the losing party below.

One of the purposes of Rule 50(b) was to avoid the constitutional questions considered in the *Slocum* case by making automatic the reservation approved in the *Redman* case for the later determination of the legal questions raised by the motion for a directed verdict.

Only legal questions actually raised by the motion for a directed verdict are reserved by Rule 50(b) for later determination. Under Rule 50(a) a motion for a directed verdict raises only the legal questions specified. It follows, therefore, that since the decision of the Circuit Court of Appeals was based on grounds not specified in defendants' motion for a directed verdict, it was based on legal questions not reserved for later determination by Rule 50, and hence, is in direct conflict with the decisions of this Court in *Slocum v. New York Life Insurance Co.*, *supra*, and *Aetna Insurance Co. v. Kennedy*, *supra*. Under these cases the plaintiff has been deprived of its right to trial by jury as guaranteed by the Seventh Amendment.

III.

The refusal by the Circuit Court of Appeals to consider testimony admitted in evidence and a part of the record on appeal constitutes such a clear departure from the accepted and usual course of judicial proceedings as to require the exercise of this Court's power of supervision to prevent a gross miscarriage of justice.

We have heretofore pointed out that in denying the petition for rehearing, the Circuit Court of Appeals refused to consider certain uncontradicted evidence relied upon by the plaintiff to establish the second essential element of an implied warranty under Section 15(2) of the Illinois Uniform Sales Act; namely, that the defendants were dealers in Tequila (*supra* pp. 6-7). The Court mistakenly stated that this evidence had been kept out of the record during the trial at plaintiff's objection, that the plaintiff could not claim the benefit of evidence which it had excluded and that it "cannot be allowed to blow hot and cold after such a fashion" (R. 258).

The evidence in question was contained in the deposition of one Gabriel Todes, a salesman employed by the defendants, and is as follows (R. 20-21):

“Q. When did you first start selling merchandise as salesman for International Industries?

A. In January, 1944.

Q. You made some sales, did you?

A. I made quite a number of sales.

Q. What commodity did you sell?

A. I sold Tequila.

Q. Mexican Tequila?

A. Mexican Tequila.

Q. What other commodity?

A. Gin. That came from Argentine, and some of it

came from Mexico. I sold thousands of cases of the Tequila."

During the trial, this deposition, which had been taken on behalf of the defendants, was duly opened in open court (R. 143) and was presented to the trial judge out of the presence of the jury for the purpose of obtaining his rulings on plaintiff's objections to certain portions thereof.* In the course of presenting the deposition to the trial court, certain of the plaintiff's objections were sustained and certain others were overruled. The record shows indisputably that the first objection made by plaintiff was to a question appearing on page 6 of the deposition. The first question objected to by plaintiff's attorney was as follows:

"Q. What were his oral instructions to you relative to the taking of orders or selling of merchandise in his behalf?" (R. 144)

An examination of the deposition shows clearly that the evidence relied upon by the plaintiff and quoted above immediately preceded the question to which the plaintiff's first objection was made (R. 21).

At the conclusion of the trial defendants' counsel noticed that he had inadvertently failed to make a formal offer into evidence of those portions of the deposition as to which

*The Circuit Court of Appeals did not suggest that this evidence was insufficient to establish that defendants were dealers in goods of the description here involved, as indeed the evidence is too compelling to permit such a suggestion. Rather, the Court stated:

"The trouble with this evidence is that it is not in the record and was kept out on the objection of the plaintiff. No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted. There was some colloquy in the judge's chambers about the deposition, but nothing was ever done in open court about it." (R. 258).

§ It is appropriate here to explain the organization of the printed record. The deposition was filed with the Clerk in advance of trial and is set out in its entirety in the record at pages 19-49, both inclusive, as filed at that time. The proceedings in open court with respect to the deposition appear at pages 143-160, both inclusive.

objections had not been sustained. He then sought and obtained the consent of plaintiff's counsel and the ruling of the trial court to the effect that such portions would be considered as though they had been introduced into evidence. The record discloses that the following transpired (R. 177):

"By Mr. Kahn: I just called Mr. Heineman's attention that I assume from our comment as we went along on the Todes deposition that what went out will stay out, it will simply be offered as an offer of proof, and the few fragments that were left in will be considered as introduced in the record. I did not take the time or the trouble to read those in.

"By the Court: They were not introduced.

"By Mr. Kahn: I know they were not and that is why Mr. Heineman is now consenting to let me put them in.

"By Mr. Heineman: He inadvertently omitted it and I am reluctant frankly to take advantage of an omission by counsel which I know is inadvertent.

"By the Court: You are agreeing that those fragments to which objections were not sustained may go in?

"By Mr. Heineman: I am agreeing that they may go in.

"By the Court: That only had to do with the direct testimony.

"By Mr. Heineman: That is correct.

"By the Court: Very well" (R. 177-178).

It was in the face of this that the Circuit Court of Appeals stated that "No part of the deposition was ever read or considered as read in evidence. No part of the deposition was ever admitted" (R. 258).

Even counsel for the defendants was quick to suggest to the Circuit Court of Appeals that it had erred in so concluding (R. 262, 266). The defendants pointed out to the

court that certain portions of the deposition upon which *they* relied had in fact been admitted into evidence, but denied the admission of the first six pages of the deposition (R. 19-21) upon which the plaintiff relied. Defendants requested the Circuit Court of Appeals to modify its conclusion that no part of the deposition had been admitted (R. 262-264, 266). This position of defendants is patently inconsistent. Although they urge that certain later portions of the deposition were admitted pursuant to the agreement of counsel, they deny without basis that the first six pages of the deposition were admitted, although these pages contain such basic information as the witness' name, address, occupation and relationship to the defendants.

The agreement between counsel and the ruling thereon by the District Court makes clear that all portions of the deposition as to which objections were not sustained were admitted into evidence. None was made or sustained to the evidence relied upon by plaintiff. The refusal by the Circuit Court of Appeals to consider that evidence constitutes such a departure from the accepted course of judicial proceedings and works such a gross injustice to the plaintiff, as to require the supervision of this Court.

The clarity of the record quoted above with respect to the admission of the evidence relied upon by the plaintiff strongly suggests that the Court failed to read that portion of the record, although it was twice expressly brought to its attention (R. 243-244, 261). However, even assuming that the record is ambiguous as to the scope of the trial court's ruling on the admission of the evidence relied upon, the Circuit Court of Appeals erred in denying plaintiff's motion under Rule 75(h) of the Federal Rules, for the remission of the record to the District Court for the purpose of having the trial judge certify whether or not the testimony had in fact been admitted into evidence. If the record on this can be said to be susceptible to a legitimate difference of opinion, the resolution of that difference is

peculiarly a matter within the province of the trial judge. Rule 75(h) was designed for such a situation, and in the event that the record is in fact ambiguous, the mandatory language of the Rule can not be ignored. Rule 75(h) provides in part as follows:

“(h). *Power of Court to Correct Record.*—It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth.”

The refusal to remit the record to the District Court conflicts with the decision and practice of the Circuit Court of Appeals for the Eighth Circuit as announced in *Beck v. Federal Land Bank of Houston*, 146 F. (2d) 623 (C.C.A. 8th, 1945) and probably with that of the Court of Appeals for the District of Columbia. *Cf. Reynolds v. Imlay*, 118 F. (2d) 53 (App. D.C. 1941).

WHEREFORE, the petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit in the case entitled *Globe Liquor Company, Inc., plaintiff-appellee, v. Frank San Roman, et al, defendants-appellants*, No. 9146, in order that this case may be reviewed and determined by this Honorable Court.

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